Approved as Submitted 2/23/09 pw

MINUTES
Board of Zoning Appeals

January 26, 2009
4:00 P.M.
City Hall, Council Chambers
Fredericksburg, Virginia

MEMBERS PRESENT	MEMBERS ABSENT	STAFF
Ricardo Rigual, Chair	Janet Sokol	Raymond Ocel Jr., Zoning Administrator
Richard Conway, Vice Chair		Kathleen Dooley, City Attorney
Roy Gratz		Debra M. Ward, Zoning Officer
Helen Ross		Sheree Waddy, Recording Secretary

Call to Order

Mr. Rigual called the meeting to order at 4:34 p.m.

Determination of a Quorum

Mr. Rigual took roll and determined a quorum was present.

Public Hearing Item

1. **Appeal of a Zoning Administrator's decision** in regard to a decision rendered on November 12, 2008. The Zoning Administrator issued an opinion in regard to the number of existing lots located at the northwest corner of the intersection of Hanover and Littlepage Street. The Zoning Administrator, in issuing the opinion determined only one lot exists at this location. The appellant disagreed with the Zoning Administrator's opinion and is appealing the decision to the Board of Zoning Appeals.

[Verbatim]

Ms. Dooley: Thank you Mr. Rigual, members of the Board, I'm Kathleen Dooley, I represent Ray Ocel, the Zoning Administrator, and what we're asking you to do tonight is: A – uphold Mr. Ocel's written determination that he issued on November 12th, and then under Item 2 on the agenda we are asking that you reject or disapprove the variance request that this is related to.

Mr. Ocel's opinion arose in the context of a variance request that is before you. Properties by US, LLC asked the Board for a variance from setback requirements under the R-4 zoning for land at the corner of Hanover and Littlepage Streets. It looked as though this land was a single legally subdivided but non-conforming lot; it's called 901 Hanover Street. You heard the first variance application back in August or September and rejected it. The applicant then revised

their application for the variance and came back with that revised application. In both cases the staff recommended granting the variance because it appeared that the lot was a lot of record and that a variance was needed to avoid an undue hardship that the applicant would not be able to develop the lot at all if the Board did not grant a variance. In the middle of the second application the issue arose: Is 901 Hanover Street in fact a legally subdivided non-conforming lot? If so, then the variance application should go forward, but if not then it really shouldn't and the Board should deny the variance request. Ray did some research, and he had the title to the property brought to his attention, and we also looked at the subdivision plat records that were filed with the Circuit Court. On November 12th he made that final determination saying in fact this is not a legally subdivided non-conforming lot. And that's the question before you today.

How does a lot become legally subdivided? There is a very simple answer to that which is that a plat is recorded with the Circuit Court Clerk. Since the 1960s those plats have had to be approved by City officials. At least according to our research so far there is no subdivision ordinance on the books of the City prior to the 1960s. When Ray looked at the records of the Circuit Court Clerk he found one recorded subdivision plat from 1938 and that's been submitted to you it was Exhibit 3 in my submission. And it shows a single lot there at the corner of Hanover and Littlepage. It starts at the corner and it goes back for, well I will not try to read it, but it goes back then goes parallel with Hanover and it comes back to Hanover parallel with Littlepage. That was it until April of 2008 when the new plat was recorded. This 2008 plat, which again is in your packet, it was submitted with the variance application, that purported to be a boundary line plat. In other words, the surveyor in 2008 went out and researched the records found where the boundary lines were and then drew them. There is no indication on this plat that there were any new boundary lines created in 2008. But, the 2008 plat shows two lots where the 1938 plat showed one and there are no subdivision plats recorded in the intervening time period that subdivided that 1938 lot into two. So the simple answer of how many lots exist here is one based on the plats recorded in the Circuit Court Clerk's office. The applicant is suggesting, or insisting that the BZA should recognize the tax records of the Commissioner of Revenue as proof that this lot was subdivided. Well our first question when we heard that was to ask ourselves what do these tax records say about whether one lot or two lots exist there at the corner. And we have submitted to you a letter from Nancy Dawson. Nancy works in the Commissioner of Revenue's Office she works in the Real Estate Tax division and she has been there for some time. She reviewed her records and said, well what do these records show. What she found was that there had been two assessments and bills for this property from 1943 through 1962. Now you may remember that during that time period it also appears there were two structures on this property. What we understand is that there was a 901 Hanover Street, single-family dwelling and then the duplex on Littlepage, 802/804 Littlepage Street. From 1943 through 1962 the Commissioner of Revenue generated two tax bills that were divided and sent those. There was a single owner of the property and both of those tax bills were sent to that single owner, but the property was assessed as two pieces. Beginning in 1962 until 1967 the billing for the property changed. At that point all of the land was assessed as one piece and it was billed with 901 Hanover. So if you think of your real estate tax assessment there is the assessment for the land itself, the land value, and the structures have a separate tax assessment. From '62 until '67 the structure at 901 Hanover was assessed along with all of the land for the entire lot that was one bill, then the duplex structure was a separate bill. Beginning in 1968 through 2008, in other words the previous 40 years, the property has been assessed and billed as one. Remember that in 1968 it looks like that 901 Hanover Street building was demolished and the tax records followed along accordingly. So now the bill is all one, all of the land, all of the

structures on one bill for the previous 40 years. That is what the tax cards show and those cards show the history of the billing of the taxes. Nancy also reviewed the tax maps and said, what do our tax maps show. We have those back to 1959 and not earlier. But, when she looked from 1959 to April 2008 this lot, as shown on the 1938 plat, that is one tax map lot and only one tax map lot on the tax maps. That never changed until April 2008 with the recordation of that subdivision plat. So when we asked ourselves what do tax records show and do show that this property was subdivided my conclusion is they show that it's been a single tax map parcel. And they show to me that the billing has been divided in various ways, I think for the convenience of the owner. And I'm thinking that the real estate tax expense was probably offset by the owner against the income that the property produced and if he had two income producing structures there he may have wanted to allocate the real estate expense to those structures for his income tax purposes. That's my opinion based on what Nancy is saying I don't have the owners, the Freemans, here to say anything. I think it was for the convenience of the owners, the tax bill was changed several times, three times, over the last sixty some years, but for the previous 40 years we've got one tax bill and since 1959 we've got a single tax map lot. So I don't think the tax records show this lot was subdivided at all, they do contain that card about the bill being divided, but they don't subdivide the property, just as a matter of fact.

Second, we ask ourselves what is the importance of tax records at all. For that we've got a binding decision of the Fredericksburg Circuit Court that involved the Board of Zoning Appeals. This decision was issued in 2004 (right before I got to the City) the exact same issue was decided there. This was the Top Notch case, and in Top Notch Ray had issued a decision saying that property that had six tax map parcels, six tax map numbers, six addresses, and six dwelling units was none the less a single subdivided lot because none of that affected a subdivision. The BZA in that case overturned Ray and said, no that it was six lots and can be developed as six lots. But, Judge Scott overturned the BZA and agreed with Ray. He said the Court has considered and rejected the argument that assessment of the property as separate lots by the Commissioner of Revenue since 1940 should require recognition of separate legal lots thereon. The Court being of the opinion that the Commissioner of the Revenue has no authority to create or authorize the creation of lots.

So we ask:

Question 1 – How many lots exist here? The answer is one. That is the lot that was created in 1938 by the recordation of the plat and that is the lot that exists today.

Question 2 – The applicants say well yes, but still we should get to treat this as two lots, we have vested right to do so. We asked ourselves is that correct. There is a statute that I cited in my letter to you that says that a landowner who receive written order, decision, determination, or requirement from the Zoning Administrator if he relies on that and it turns out to be erroneous he still has a vested right to use his property consistent with that written determination, decision order, or requirement. This is an extraordinary right to give to a landowner; it's saying that he has a right to use his property in a manner that otherwise would not be permitted by law because of the commitment that the Zoning Administrator has made to him.

And that is the second part of the whole question that is before you. I did not address this in my letter to you, but I think there is a real question as to whether or not this statute even applies to this situation. This statute is in the Zoning Article of the Virginia Code and the question that is

before you, frankly, is a subdivision, or that was before Ray and Debra is a Subdivision Ordinance question—is this lot legally subdivided. I don't think this Article 7 Zoning provision really applies to Article 6 Subdivision questions. So I think there's a problem with even looking at the statute in the first place. But let's move ahead as if it does cause that's certainly what we addressed in our letter to you, and I don't think it does).

Number one, is there a written order, requirement, determination, or decision here that says you have two lots. I determined that two lots exist, not one. The decision must be in writing, the statute that subsection of the statute, Section C, clearly requires that the order, requirement, determination, or decision be written.

Second, I would certainly interpret the statute, that word written, to apply to all those order, requirement, decision, or determination words because of the importance of what we are talking about. This is a vested right—to use land in a manner not otherwise permitted by law. I don't think they meant to say you could get that vested right based on an oral conversation, a verbal conversation with the Zoning Official. And to show you, I think this whole case is a good example of why an oral communication should not be enough. You have differences between what Ms. Ward is saying occurred and what Mr. Angstadt and his surveyor will say occurred in that meeting. Ms. Ward said in her affidavit that she filed with you that she did meet with them, they showed her their tax map card their tax card and she said, it appears to me that you have a subdivided lot. But, she's pretty adamant that she used the words "it appears to me that this is so." That is provisional language that's tentative language it calls for further action. Mr. Angstadt, on the other hand, in his affidavit says, or in his testimony before you has said that he received a firm declaration or determination that this was it, no tentativeness about it. So, you see that when we are working in an oral situation or an informal meeting you can have two different versions of what happened and it's hard to can see how you can base a vested right on such an indeterminate state of affairs. The applicant cites the case of Lilly versus Caroline County to say an oral determination is enough—we can work with this. All I would say to you is that the Lilly versus Caroline County, which is a 2000 case from the Virginia Supreme Court dealt with a different subsection of the statute. Subsection A does not include this word written. It is the one that says any person that is aggrieved by a decision of the Zoning Official has the right to appeal it and must appeal it within 30 days or that decision is a thing decided. Subsection A does not include the word written anywhere in it and in the case of Lilly versus Caroline County the Zoning Administrator there made a very formal determination in a very public setting with people present and it was actually a months long process before he came out with a formal public determination that was stated like that. There is a different case on that Subsection A called Vulcan Materials versus Chesterfield County that says where a developer has had oral consultations with staff in preparation for filing an application that doesn't rise to the level that would be recognized even under Subsection A. It is a little technical, but it is clear to me that in order to get a vested right under Subsection C that has to be based on determination made in writing. It is that level of formality, that level of staff work and concentration, not an informal conversation with one of the Zoning Officials.

And finally, we ask ourselves did Mr. Angstadt receive a written order, requirement, decision, or determination that the land had been legally subdivided and the answer is no. I don't think that there is real contest on that question. Mr. Ocel's staff report on the two staff reports certainly implied that that is an assumption they are working on. In Mr. Ocel's case that was based on the subdivision plat. In Ms. Wards case she had met with the developers and that was in fact what

she thought was happening. But there's a process that is very well know in the development industry and it's a very routine process for the Zoning Official, where someone needs a determination they ask for it and they receive it in writing and they receive it from Mr. Ocel. There is a level of formality to that and then of course the Planning Department is bound by the determination they've issued. That didn't happen in this case. There was a very important decision that was held at a very informal level and it was never raised to the formality or seriousness or the binding level of a written determination. Therefore, we feel that there is no vested right to proceed as if there in fact had been a legal subdivision of the land. That's why Ray in his letter concluded that the land was not subdivided and that the variance should not issue and we would like you to uphold his determination.

Mr. Rigual: Are there any questions for the staff.

Mr. Gratz: I'll ask a couple of questions. During that time period from the '40s through 59 there is a statement in here that says the property was assessed as two separate properties with buildings and land values for each property. Do you know how the land value was apportioned in that, fifty-fifty. If you go by that little hand drawing it looks like the 901 Hanover property was only about a third because there are no markings on there as to what the actual dimensions are, but was there a fifty-fifty or any other kind of apportionment.

Ms. Dooley: That's a good question, I'm afraid I don't have that level of information. I've got what's in Nancy's letter and I don't know if they have tax bills that would go back that far. You're basically asking if they took the land assessment how did they apportion it, how much did they put on one and the other and I don't have that information.

Mr. Gratz: It seems as though since 1963 then I guess the land was taxed as one property and then all the land was attributed to one of properties, 901 Hanover apparently, up until the house on there was demolished and then after that it was apportioned as one property period for the duplex and the land. I guess one thing about is that the dividing line that is hand drawn on the card appears to be like I said about a third of the way down from Hanover Street, certainly not fifty-fifty and the drawing that's recorded has 901 Hanover Street getting a larger, I don't know if square footage because the property appears to be irregularly shaped, but it certainly is more than half way down the Littlepage Street side and going by the drawing on the card that would not be case, I don't think. That's just an observation on that one.

I guess my other question goes into the second part of it with regard to whether the decision was made in timely fashion whether there in fact had been a determination made in the spring so that the sixty-days had elapsed. I guess when I was reading this, Mr. Lemming brings it up, but I had actually picked this up beforehand, it says, "in no event shall a written order, requirement, decision, or determination be made." My first question right there was does 'written' modify all four of those nouns afterwards or does it just modify 'order.' Your [Ms. Dooley] opinion on it is that it must, of necessity, modify all four of them because of the importance of the issue. I don't know anything about legal language and sorts of things in cases like this is it normally assumed that a modifier like that will modify all of the things that follow; that's an important part because if it's only written order then you could make some arguments about the oral things, the other issues.

Ms. Dooley: What I would say in response to that is A) as I said it's a very important issue, vested right, so you can see why it would be written; B) I don't know of any reason to distinguish between the order versus requirement, decision, or determination. Why should one be written and the others be permitted to be verbal; and C) if they meant or verbal or oral requirement they could have said that they could have said orders have to be written everything else can be oral. I don't know why they would have, but those are reasons why I think Subsection C requires something in writing. The Virginia Supreme Court has had one case under Subsection C where they said that the burden of proof for vested right, if you think you've got a vested right under Subsection C the burden of proof is on you.

Mr. Rigual: I have a question about the meetings that occurred in March and April with Ms. Ward. I read your affidavit but I just want to get a little more detail if I could on that. The first one was on March 19th were there three, you, Mr. Angstadt and was there a third party present at that or was it just the two of you at that one, the first meeting.

Ms. Ward: There were three of us.

Mr. Rigual: Who was that other person?

Ms. Ward: His surveyor.

Mr. Rigual: I think he testified at an earlier hearing.

Ms. Ward: Yes.

Mr. Rigual: What information did they have for you on that day and what questions were asked of you?

Ms. Ward: They had some copies of the real estate card that they had obtained from the Real Estate Office and a copy of a demolition permit for a house that was previously addressed as 901 Hanover.

Mr. Rigual: Those were the only two documents they had.

Ms. Ward: They may have had a copy of more than one real estate card.

Mr. Rigual: Did they have the deed of 2005, I think it's in I don't know what exhibit, when Mr. Angstadt purchased the property in 2005 did they have that deed.

Ms. Ward: No.

Mr. Rigual: Did they have the deed in 2, April 2000, no they wouldn't have had it at that meeting. How about the um, The next meeting is important because I think there's a difference of opinion on what happened – On the March one again, I'm sorry, what were you asked to do in the March meeting. What was the purpose of the meeting and what were you asked to do?

Ms. Ward: The purpose of the meeting was, and it was not a planned meeting Mr. Angstadt just dropped by my office, he had been to the Real Estate Office and he had gotten this information

and he had brought it up to me to show me what he had found which led him to believe there were two lots. And he said the way he understood the Real Estate Office to explain it to him was that when a property line had been erased for the convenience of the property owner so that they would receive one tax bill instead of two in order to get that line back you had to record a plat with the Land Records Office. I told him that that too was my understanding of how the process worked in those situations. But I was not asked to make a determination.

Mr. Rigual: Did he tell you what his belief was based upon. Why did he believe there were two lots? Did he say anything about that?

Ms. Ward: From the information he got from the Real Estate Office.

Mr. Rigual: Do you know what led him to go to the Real Estate Office in the first place. I'll ask him that question.

Ms. Ward: I don't.

Mr. Rigual: What about the, in the April meeting I think there's a difference of opinion. The April meeting now, who was there and what was discussed during that meeting.

Ms. Ward: The April meeting?

Mr. Rigual: Yes, was there another meeting in April.

Ms. Ward: No.

Mr. Rigual: April 4th.

Ms. Ward: No.

Mr. Rigual: Were there any other meetings after that.

Ms. Ward: No.

Mr. Rigual: Maybe I misunderstood.

Ms. Ward: We did exchange emails, there were no formal meetings.

Mr. Rigual: Does anyone else have any questions for staff before we hear the applicants.

Mr. Conway: In my notes, I can't put my finger on it now, but do you think there has been an illegal act involved in any of this. I wrote the word illegal in my notes and maybe it pertained to the diagram being draw, but it's in here somewhere and I just wanted to clarify that.

Ms. Dooley: I don't think there is anything illegal with respect to what the Commissioner of the Revenue did back in the forties. The recordation of a subdivision plat that has not been approved by the subdivision agent for the City is a violation of City Code and of State Code.

Mr. Conway: When I said illegal I didn't mean necessarily referring to the City or Mr. Lemming, it came up in the notes.

Mr. Rigual: We will now hear from the applicant.

Mr. Lemming: Thank you, good afternoon Mr. Chairman. I appreciate that this matter is more complicated than most of the cases that come before you, and you all I know, before my involvement in this, have been wrestling with some of these issues for a period of months and apparently a couple of appearances by the parties. Both Mr. Angstadt and the surveyor, Mr. Tatum, are present should you have questions you that you would like to put to them as you did to the board [staff]. I would like to give to you affidavits, this is what Ms. Dooley was referring to. These are affidavits from both Mr. Angstadt and Mr. Ward, I mean Mr. Tatum, I'm sure there are plenty there for each of you to have a copy of those affidavits. As I'm sure you can also appreciate, and you will hear from, I think you'll hear from one of the property owners, one of the owners of these pieces land, as we'll call them at this point, Mr. Stageberg. Who paid fair market value for one of these parcels and is not able at this point to do anything with the parcel that he owns. Needless to say this is a serious matter and has caused some considerable hardship for some of the parties already at this point. Ms. Dooley has identified some issues that she thinks are pertinent in this case and I am going to pretty much follow along the same lines she has identified. And in her letter to you I think she correctly stated the issues. The first issue being whether or not the Zoning Administrator can reverse an earlier decision or determination by Ms. Ward, a Zoning Official, and we are going to talk about what we believe that determination was in just a moment. The Second issue is whether or not the property does consist of two legal non-conforming lots, and we've used that language intentionally. Ms. Dooley said maybe you all don't even have jurisdiction to hear this, maybe this isn't a zoning matter. We are dealing with legal non-conforming lots here, that's what we've assumed all along. You go to get in-fill calculations that help you with such lots it all comes out of the Zoning Ordinance. So we're assuming that what this has to do, the underlying issue here is whether or not there are two legal non-conforming lots. And that I think is clearly a zoning issue.

Now I think, at least in my view, Ms. Dooley addressed the issues in the wrong order. So I'm going to reverse the order that she discussed the issue. And the reason for that is that in the event you do conclude that there was a prior decision/determination by Ms. Ward, back in March of 2008, the second issue really becomes irrelevant. That is the decision that is binding, that is the decision that the then owners and present owners are entitled to rely upon based upon the code section Ms. Dooley talked to you about and I will talk some more to you about. Now, in order to reach a determination about what happened last March the Board of Zoning Appeals is going to have to make some factual determinations, as Ms. Dooley also intimated. Now, I don't know what your normal custom is for but this, but it's clearly within the province of the Board of Zoning Appeals to make factual determinations as to what actually happened. So that's where I would like to start, with what we consider to be the critical, factual matters that are before you. I'm going to run through them and I'm going to cite for you the specific basis or reference for what I'm going to say.

Mr. Angstadt states in his affidavit, and I don't think this is contested, that in March 2008, specifically March 18th of 2008 that he requested in-fill calculations for the parcel in question here. Now, I'm sure you all sitting on the Fredericksburg Board of Zoning Appeals have dealt

with in-fill calculations and know what they are. Basically they are to deal with non-conforming lots so you can put a structure on the lots. And of course that's much more of an issue with regard to older jurisdictions where lots do not conform with the current zoning ordinance than in the counties where the lots and the subdivisions are more recent. The calculations were provided to Mr. Angstadt by email and the date of that email is the next day, March 19th of 2008. That email is attached to the letter that I had sent to you all which I assume—some of you all have been talking about it—so I assume you all received it. I do have other copies if for any reason you did not. The letter says, it provides the in-fill calculation, and contains something that Ms. Dooley refers to in her letter, I believe, as something of a caveat. There's an assumption there that the lot is developable. That I would say from the onset is something that can be interpreted several ways. Developable does that mean that a house can be put on it. It really doesn't go exactly to the issue of whether we have a legal non-conforming lot here. It really seems to go more to the issue of whether or not you can put a house on it. We'll assume though for purposes of our discussion here and what happened back in March and April of 2008 that there was some sort of caveat, some sort of qualification, something that raised some sort of question about the lot and indicated that perhaps there was further inquiry that was perhaps necessary with regard to that lot. That concerned Mr. Angstadt and his surveyor. You will note in the affidavits from Mr. Angstadt that that caused him to set this meeting up with Ms. Ward or at least come and see her and talk about it, if we can reconcile whether it was a pre-scheduled meeting or he just stopped by. But it was that language that concerned him. The surveyor on the other hand was perplexed about where to draw the line and to show the division between what they both believed were two parcels, based on the work they had done to date. So they setup a meeting and the specific purpose of the meeting, as we indicated in our letter to you, was to figure out first of all to question what developable meant and whether or not there was any issue with the lot. But then to find out how you draw line where you put the line because there were not stakes on the property.

And thirdly, to clarify the in-fill calculations because there had been some issue raised about whether or not they were exactly right, whether it was a corner lot or faced this street or that street. So the meeting occurred, and I don't think there is any contest about this, on March the 28th of 2008. Now that is the date, for future reference, that is the date we are saying that a determination or a decision was made by Ms. Ward. And according, and I don't think this part is contested either, according to both affidavits they went down to talk with the staff in the commissioner's office. According to Mr. Tatum Ms. Ward shared with him showed him where to draw the line on his survey plat, because that is the point on which he was stuck—where to put the line between the two different parcels. His statement is that that indeed is what he did, that's where he placed the line that became the division between the two lots in the survey that was of course recorded with both of the deeds that then went out based on that information. Now there are some subsequent emails, and this one is not discussed by Ms. Dooley in her letter but it is discussed by Ms. Ward in her affidavit. There is a April the 4th memo, and there was question earlier about whether or not there had been a meeting in April and this may have been the source of that confusion. There was an email, a subsequent email on the in-fill calculations that was provided by Ms. Ward to Mr. Angstadt and the date on that is April the 4th of 2008 and without getting into the details of the in-fill because that is really a secondary issue here there was clarification on that a suggestion that something that Ray, Mr. Ocel, still needed to make a decision on that. What doesn't appear on that email is any indication that there is any further concern about the developability of the lot. As occurred and can be seen on the March 19th email. So that issue is not re-referenced there is no caveat, if we can call it that, for the April the

4th email. Then we have a final email one dated April the 11th 2008 and it indicates that Mr. Ocel had finally, well not finally, he had weighed in on which way this faced and whether a rear setback would be necessary or not and indicated that a variance would be required if they wanted to reduce that setback. They did not worry about that because they just changed the configuration of the house. But suggestion, I think the import of that email number one is that again we do not have any caveat or reference or concern about the developability of that lot the one in question here and it indicates that Mr. Ocel has at least in some sense reviewed all of this and made a determination about this. Implicit in all of this if you go to the City as was formally requested go to the City ask for the in-fill calculations implicit in all that is that you can use them, that you can use them on the lot in question otherwise the in-fill calculations are irrelevant. If there is any question about the developability the buildability of the lot, whether or not it's a legal non-conforming lot or not why give out the in-fill calculations. So in your consideration of this I'd ask you to consider that. The only real discrepancy I see with regard to the sequence of events and what is said in the affidavits is that Ms. Ward makes a statement that she didn't make a formal a decision at the March 28th meeting. Formal decision, I submit that is a characterization not a fact. That is her perhaps opinion of what she did or didn't do. The making of a determination or a decision by a county/city official rather it be a Zoning Administrator or Zoning Official (as is Ms. Ward) an administrative officer is not some earth shattering event that occurs. Dozens of these decisions are made every day and as we'll discuss a little more in a minute, the purpose of Code Section 2311C is to protect the person relying on that decision so if they change their position, if there is material reliance on that decision that indeed that decision carries and isn't something that can be changed after 60 days. Finality is the objective of the statute and we will talk about that a little bit more in just a minute. Looking at the facts here what I would ask you to consider first of all if indeed there were not a determination, a decision made on March the 28th what explains what happened after that. There were two clarifications on the in-fill calculations that occurred very quickly. The surveyor clearly thought he had the information that he needed because he put the line on the plat and that plat was recorded with the deeds. The two lots, the two sides of the lots on either side of the boundary line were sold for fair market value. It does not make any sense that the owner and on one there was a contract entered into to build a house, it certainly does not make any sense whatsoever that they would take those steps if they thought there was still any confusion about the lots and whether these were legal non-conforming lots or not. Beyond that on the City gets back into the picture even beyond the April emails. In August, as Ms. Ward indicates in her affidavit, there is a realization that she has given the wrong in-fill calculations. So she and Mr. Angstadt talk, they set up this variance application, the fees are waived incidentally because they want to get this corrected. The application goes forward, that's when you all first become involved in this. Everybody assumes that these are two buildable lots, nobody questions that these are legal non-conforming lots. The first variance application report was prepared by Ms. Ward that's the one you all denied in September. The second application report was prepared by Mr. Ocel. He's still assuming, everybody's still assuming, that there are two buildable lots here. We're five months after the meeting with Ms. Ward and the subsequent actions that occurred. So it simply belies any logic in this particular situation that the events that occurred after March the 28th would have occurred if there was any doubt that Ms. Ward had made a decision or determination about the viability these lots and whether they were legal non-conforming lots. The same issue, and I referenced this a minute ago, with regard to the in-fill calculations, really putting the cart before the horse. If you've got a problem with the lot, if there's any question about the viability of the lot and whether it's a legal non-conforming lot why is the City giving out in-fill calculations. If there were an issue if anybody had a concern about the viability of the lot that would have been

the time to have raised it before there were in-fill calculations that were distributed and certainly by time you get to point of realizing you'd made a mistake about in-fill calculations as occurred in August.

And finally, with regard to the viability of this lot and whether or not it's a legal non-conforming lot, whose in the best position to know, whose in the best position to answer that question; and I would submit to you that that pretty clearly is the City officials charged with subdivision and making such determinations about legal non-conformity. So, I think that in assessing the facts and first step is to figure out what happened last March those are the compelling facts. Everything that I've indicated to you is covered either in the affidavits or documentation you have and I think the only real point of factual, and it's not even factual, the only real difference is the conclusion that Ms. Ward draws in her affidavit that she did not make a formal decision. And my position is it doesn't matter, the decision was made the formality is not relevant.

Let us turn for a moment to the legal issues regarding the Zoning Administrator's determination or the Zoning Official's determination the subsequent Zoning Administrator's determination and the appeal. And the questions that some of you had asked before I think are extremely pertinent here. Section 15.2-2311, I thought I heard Ms. Dooley say, and I think she's explained to you that there are three components to this Code Section, and anyone in land use law uses these sections a whole lot. The first Section A governs who can make an appeal to the BZA and how those occur. I thought I heard Ms. Dooley say there's no reference to a written order there. Actually, in that Section A the term written order appears twice. It appears in the context of the appeal period, that is necessary that goes with these determinations which is 30 days, but it is clearly spelled out there—written order. Notice of a zoning violation or written order appeal must be made within 30 days and it repeats it in the very next sentence. So the term written order is not a stranger to this statute and indeed appears in Code Section A. Now the Lilly case that Ms. Dooley mentioned this is a very interesting case. I apologize, if I were in court this is what I would do [stood up to pass out copies of the Lilly Decision]. In the Lilly Decision the Planning and Zoning Director for Caroline County, his name is Mike Finchum and he is still there, and in fact just like Mr. Ocel he wears both of those hats he is the Planning Director and the Zoning Administrator. Mr. Finchum was asked a question about the matter that was pending before the Board of Supervisors during a hearing, during a Board of Supervisors meeting. Without getting into the details of what he was talking about, it was about whether a conditional use permit was required or not, he got up and orally said yes you've got to have a conditional use permit, yes that is my opinion you don't like it you can appeal it. The issue that went to the Virginia Supreme Court is whether or not that was an official determination of the Zoning Administrator. The problem of the Plaintiff in that case is that they had not appealed it within 30 days as this particular statute requires. The Virginia Supreme Court came back and says it doesn't matter that it was oral, that was a determination of the Zoning Administrator you have 30 days to appeal it, you're out of Court because you did not do it within 30 days. So the fact that it was oral did not affect at all the statute the provision the 30 day notice with regard to the appeal when the rights of the person trying to appeal went out the window all together. I submit that down in Subsection C the same wholes for 60 days. We have the reference at Subsection C that some of you are already familiar with, "in no event shall a written order, requirement, decision or determination made by the Zoning Administrator be subject to change modification or reversal by any Zoning Administrator or other Administrative Officer after 60 days." Ms. Ward is clearly an Administrative Officer she's covered by the Code Section. I think that the argument that written order pertains only to the word it is coupled with written and order goes back to

Subsection A. The fact that you have already be introduced to written orders, the fact the Virginia Supreme Court has curtailed the appeal rights of a private individual based on its interpretation of Code Section A of which it did not require any kind of formality or written order according to the Virginia Supreme Court. I cannot, from my standpoint, this issue has never nobody has ever contested this before that the 60 day provision also applies to anything that can be established as a determination or decision of the Zoning Officer, or Zoning Administrator, or Administrative Officer. In Stafford County the Board of Zoning Appeals recently found that a building permit and the discussions surrounding that building permit were sufficient for complying with the Code Section here and did constitute a determination or a decision. I don't think there is much question that if the decision or determination can be established, if it can be factually established that an oral determination requirement or decision is just as much covered by Subsection C as a written order would be and written orders, as I indicated, are particular animals that arise in Subsection A.

The other case that Ms. Dooley mentioned to you is the Vulcan case. Vulcan simply stands for the proposition that for a Zoning Administrator, Zoning Official, or Administrative Officer's decision, determination, requirement to be binding there has to be something pending. Some kind of application or something pending with the jurisdiction, in other words if you just walk-in off the street and say what can I do her and they give you an opinion but you don't have anything before the governing body or the county or the city that is not something that is binding. But in this case the applicant had done a couple of things. The landowner had come in and asked for the in-fill calculations. That wasn't something that you do simply out of the blue. It's not informal you want to rely on those in-fill calculations because that is how you want to now spend money to build a structure on that property. It's important you come to the City for the in-fill calculations and then go ahead with your building plans, so that was pending. You also have the issue of the surveyor and his confusion about what it was where it was the boundary line should be drawn, so that was pending that was what they came to see Ms. Ward about. And of course you had Ms. Ward's initial email that raises this issue of developability and the concern that that caused with Mr. Angstadt. So there was sufficient, there were a number of issues that were pending with the City that clarification were sought for. The clearest I think is the request for the in-fill calculations without which they couldn't have proceeded.

Now Mr., I not sure this is an issue because it has been covered in other Court cases coming out of this body, Mr. Ocel had said something in his letter about this 30 day written notice. Ms. Dooley, I give her credit, she did not raise that at all because I think she we both realize that that's a settled matter that 30 day provision that notice that occurs that is required by the statute is only required for written orders and for notices of violation that's all that pertains to.

That is the argument that is our case on the determination that we allege was made back in March 28th specifically of 2008 and we think the facts support or contention that a decision a determination was made at that point. The subsequent actions on both Mr. Angstadt's part, Mr. Tatum's part, and on the City's part the way they continued to operate all the way up to the variance applications support the contention that there was a decision made about the legal non-conforming lots back in March. That falls under 2311C, the only exceptions under 2311C the only time the 60 day provision does not apply is if it is proved the determination was obtained through malfeasance or fraud. I don't think anyone is alleging anything close to that here.

With regard to the subdivision itself, I'm going to say less about this, because it is our view the determination about the viability of these lots was made in March of 2008 and if the Board of Zoning Appeals concludes that that was case the decision of the Zoning Administrator

[tape ran out]

I do want to spend a few moments on it because Ms. Dooley has talked at length about it rather than the other issue. I think there are some important things and I think if I discuss this a few minutes you will see why it was pretty easy for the parties here, Mr. Angstadt and the City Officials, to have relied on the information that was presented to them.

First, this I think is the information that was most important from the commissioner's office, and let me say that our position is not at all as was the case with this Top Notch case that Ms. Dooley was talking about, our position is not at all that the Commissioner created a subdivision. The Commissioner simply recognized, acknowledged the subdivision that's the Commissioner's job. Indeed there's a Code Section, this is Code Section 58.1-3290, which governs Commissioner's of Revenue, "When a tract or lot becomes the property of different owners and two or more parcels" and I'll read down just a little bit, "it is the duty of the Commissioner of Revenue shall assess the same at its fair market value as of January 1 of the next year succeeding the year in which the tract or lot of land becomes the property of several owners with regard to the value of which such tract of land was assessed as a whole." Actually it ends by saying "failure of the owner or person dividing and selling the land to record a plat thereof shall not relieve the Commission of Revenue of the responsibility for assessing or reassessing any such tract of land when subdivided as provided for in this section." So it's the duty of the Commissioner of Revenue to assign these separate assessments whether there is a plat of subdivision or not. The starting point (I have a copy of this for you all) I don't think this particular record has been discussed and the record that I'm referring to this is a compilation of a number of the cards that constitute the Commissioner's record. If you look at the one in the upper right hand corner, there is a date beside it, 4-4-42 and it simply says lot divided. In her letter to you all Ms. Dooley suggests that that meant to her the Commissioner was going to start sending separate bills. Well I don't generally see that kind of the notation on cards like this, if it is there it would say separate bills, this says lot divided. This is not the Commissioner making a subdivision, this is simply the Commissioner recognizing the fact that a lot had been divided, ergo subdivided. The Commissioner's job at that point, at least under that Code Section, is to assess separately, as they did for a substantial period of time. We read this as simply recognition that there was a subdivision. Recall that in the 1940s as Ms. Dooley indicated to you there was no subdivision ordinance in the City of Fredericksburg, not many jurisdictions at all because the legal authority for that did not come about until the 1940s, but Fredericksburg did not adopt one until the 1960s as best we can determine. Things were done much more informally in the 1940s, but here we have the Commissioner acknowledging that there was a subdivision there. Now someone asked a few moments ago about how this was split up. While we were sitting over here Mr. Tyler actually went through the assessment cards and has allocated shown the differences in the land for the two parcels over the years all the way up until the 1960s. I will read them to you the documentation is there:

1942 - Hanover was $215 (doesn't that sound good)
$600 for Littlepage
[19]46 - $360 Hanover
$918 Littlepage

1950 - $900 for Hanover
$1,012 for Littlepage
1954 - $418 Hanover (it went down)
$330 for Littlepage (Hanover was actually assessed higher)
1962 - $600 for Hanover
$600 for Littlepage (exactly the same)

Today we went on the internet and actually pulled the current records, this is the current assessment and I apologize I don't have enough copies, but you can share these for each of these addresses. [He passed out copies to the Board and staff] What these records show is that each of the sides are still separately assessed at least as far as the land is concerned. At least the value is assigned to them, and their each assessed at the same amount, $100,000, each side of this property. So the land is still split that is the current assessment so they've continued to split-up the land. The other things that I think are relevant about the subdivision issue should you think you need to reach this point are these. There never appears in any of the Commissioner's records any indication that the parcels were consolidated. We have the 1942 notation that they were divided, but there's never anything that brings them back together, no consolidation. The matter of billing, as I think Ms. Dooley indicated, is done almost solely for the convenience of the taxpayer, the same person owns both lots you can send them the same bill. Simply go down to the Commissioner's office and say please bill me on the same bill for these things I own both of them. So I don't think the billing has a whole lot to do with recognition of whether there were separate parcels here. But I think the important things is that the Commissioner way back in the 1940s recognized the separate parcels, certainly they existed with separate houses for a substantial period of time, and there is still a pretty strong indication that they are considered separate. Does not create a subdivision—and I don't know how the subdivision was created I don't think anybody knows exactly how the subdivision was created. I can speculate, as Ms. Dooley did, about what maybe the justification would have been, I can speculate about how the subdivision may have occurred back then—everything was done very informally and frequently people simply came to the Commissioner's office and said I have split this up and here is how I want you to handle it from now on—things were that informal.

As far as the Top Notch case was concerned, just a few other things to distinguish that case, as I indicated we're not maintaining as was maintained in that case that the Commissioner subdivided lots. That is not what we're saying at all we're saying the Commissioner consistent with his duties simply recognized that there was a subdivision here. Also, in that case we don't have, the most important thing here, we don't have a pre-existing determination or a decision by a Zoning Official that these were two legal non-conforming lots, which is what we're alleging here, nothing like that in Top Notch. Simply Mr. Ocel's opinion was the starting point, at least as far as determinations were concerned. Of course the Top Notch case of course also dealt with a deed that was ambiguous on its face and we do not have anything like that here either. So I would submit that is distinguishable and quite different from what you have before you today.

That covers the things I wanted to say with you, I appreciate very much you hearing us, I realize that this is complicated there's a lot at stake here for these parties. I don't think there is any question that if you look at 2311 if we get past this issue of the written order, which I do not think is an issue. No question that there has been very significant reliance on whatever happened back in March 2008. A lot of people have relied on that to extents here that are pretty much irreversible. There was a time when this could have been much more easily addressed and

corrected, but we're way way beyond that point at this particular time. I will be happy to answer any questions you have. As I indicated Mr. Angstadt and Mr. Tatum, the surveyor, are both here should you have questions for them we will make them available.

Mr. Rigual: Questions for the applicant?

Mr. Gratz: I'll ask one or two here. I thought maybe I saw something but now I'm not so sure I did. On one of these cards that you gave us here, the one you pointed out about 901 Hanover and said lot divided. There is a 600 and a 1500 written above and below that line that says lot divided, I was wondering if that had anything to do with the portions.

Mr. Lemming: If I understand what you are looking at, I think that is the first subdivision. That's simply where the original track was subdivided then there would be a subsequent subdivision that's the one referenced on the record that I gave to you that would've split the bottom half of the portion closer to Hanover Street into two further lots. If I understand you correctly I believe what you're looking at is the original subdivision that simply created two lots the bottom of which is the combination of the two parcels.

Mr. Gratz: There was actually a much larger lot that included further along Littlepage, right. And then that was once divided and then we have this thing that we're now referencing possibly as 901 Hanover or possibly as 901 Hanover-802/804 Littlepage.

Mr. Lemming: That's correct and that confused me at first also.

Mr. Gratz: I saw those and I remembered seeing something about 2100 square feet someplace in something we had here and I found it and it looks like 2100 square feet is the current square area of the one you would like to have us declare as 901 Hanover. And so the 1500 and 600 added up to 2100 and I thought maybe that was something to do with that separation.

Mr. Lemming: I think that's why the figures do not match.

Mr. Gratz: And the way it was divided. I think you heard my question earlier about the hand drawing on the back of one of these cards, which is not on this one you gave us here but it's on something else we saw earlier, does not that hand drawing certainly does not correspond to what was ultimately drawn on the plat that you registered, recorded rather. I'm looking at the very last page of the document you sent to us in the mail and that hand drawn line looks like the 901 part of it is about a third of the length of the whole lot and yet whenever, and actually the 802/804 drawing of a building on here is nowhere near the lot line where in fact it really is near the lot line on the right. But these are so vague it's not near possible really to say where that lot line should be drawn between the two parcels you want subdivided. That's my problem with trying to say that this has been subdivided.

Kind of going back to your main point that a determination had been made in March and therefore whether the lot is—anything later on about the lot is irrelevant. You made a point about there were pending issue before the City and you made the point that I could walk-in off the street and say hey I've got this lot over here can I build a house on it, and the City says maybe maybe not. Had any written request been placed before the City? When was the first written thing Mr. Angstadt presented before the City saying here's what I want to do? He went

in and it was a verbal encounter with Ms. Ward just on his part and her part initially. She responded with a piece of paper that said that this is what I determine on it. But did he actually present a written document asking for that.

Mr. Lemming: It is my understanding in the routine course of his business, because he had done this before, that he contacted Ms. Ward on the 18th, the day before and simply asked her for the in-fill calculations. Now in order to do that there had to substantial exchange of information for her to get to the right parcel and figure out how to do the calculations. But it is my understanding that is the way that occurred.

Mr. Gratz: When is the first anything written down on his part to the City?

Mr. Lemming: There are emails back and forth from him to her asking where is this, what is the status of it. I believe the one you have that pre-dates the April 11th email from Ms. Ward if you back up on that chain you will see his earliest correspondence to her.

Mr. Gratz: But an email might be considered kind of the modern equivalent to walking into the office and saying, hey kind I do something. It is in writing as opposed to [Mr. Lemming started speaking]

Mr. Lemming: I think what it turns on is the substance of what is requested. It doesn't turn so much on how it is done as what it is that is asked for and what that involves. I think there is a significant difference between someone casually coming in an making inquiries about this property that property, how it's zoned, what can I do with it and specifically requesting information that in this required a relatively formal response from Ms. Ward and getting back to him with the specific in-fill calculations. So that's why I think that rises to that level, it is not something that is akin to the situation in the Vulcan Materials case where the Vulcan official were simply asking what types of permits they would need for piece of property they were speculating about. In this case we know who the owner is, we know what the owner needs, we know what the owner wants to do and you come in and get the information that's necessary for the next step to accomplish that, which would be the in-fill calculations.

Mr. Gratz: I'm not sure who can answer this, maybe you can answer. One of the things that bothers me is how this got recorded. I guess I don't understand the process of recording plats and how come nobody caught this at the time that the plat was recorded. And that the two separate properties were recorded and then the properties were sold and that had to go through a legal process and why along the way nobody raised any issues about this. The issue on this wasn't really raised until the fall, is that correct.

Mr. Lemming: Right. The plats that were recorded were recorded at the time of the conveyance from Mr. Angstadt personally to his corporation. That's when the plat was actually submitted for record. If I convey a piece of my property to you there is no requirement, a piece of my property, there is no requirement in order to make that conveyance that I go through the subdivision process. Now if you want to do something with the piece of property I've just conveyed to you then you're going to have to comply with the Zoning Ordinance in some respect. You either have a non-conforming use and something continues as we argue the case is here, or in order to proceed to the next step to develop or do something with the property I have given to you or conveyed to you you're going to have to comply with the Ordinance and then

some kind of process or subdivision through the City or the governing body may be required. But, in order simply to convey a piece of property I can do that completely independent of the City Subdivision Ordinance. I don't need to subdivide it to give you a piece of property. That becomes critical when you want to do something with it then it got to go through hurdles, Zoning too.

Mr. Rigual: Actually the first questions I'm going to have is related, but I want to ask Ms. Ward another question I want to clarify this meeting now that I understand more clearly how the meetings occurred. On the 28th were you asked to determine if there was one lot or two on that meeting on the 28th were you asked to determine if there was one lot or two?

Ms. Ward: No.

Mr. Rigual: It's also been said here that, at least according to the surveyor, that you indicated to him where he should draw the lot line. I mean the surveyor has testified before at a prior hearing and we all asked him questions, I remember specifically about asking him questions about how he came up with that line and Ms. Ward's name was never mentioned as 'she told me where to put it.' I think that was said today that you actually told him where to put that line, is that correct.

Ms. Ward: No, that's not correct.

Mr. Rigual: Did you discuss the lot line and where it should go.

Ms. Ward: No.

Mr. Rigual: The next question is, is it correct that the conversation on the 18th was only a request for in-fill calculations at that point. [Question addressed to Mr. Lemming]

Mr. Lemming: No I don't think that it was or could have been. If the request was solely for in-fill calculations why did they go to the Commissioner of Revenue's office?

Mr. Rigual: Well that was going to be my next question. I am asking Mr. Angstadt, and maybe he can better speak to this, called Ms. Ward, and I think that is what I heard today, that he called her and asked her for in-fill calculation for this lot.

Mr. Lemming: That's how it started.

Mr. Rigual: Right, that's my question that's how it started. So at that point there was no issue if there was one lot or two, everyone had the assumption that it was two. At least Mr. Angstadt did at that point.

Mr. Lemming: He certainly did. I think his concern was raised by the March 19th email that raises the issue of the developability. So from his standpoint that's what led to the subsequent meeting.

Mr. Rigual: Do you know why he was under the belief that he had two lots instead of just one.

Mr. Lemming: By review of the tax records that he had. He relied pretty much on the tax records at that point. He thought they were evidence that the subdivision had occurred.

Mr. Rigual: He bought the property in 2005. You haven't addressed the deeds so I want to ask you a little bit about the deeds. When he bought the property in 2005 and on that deed it was conveyed as a single parcel, is that accurate.

Mr. Lemming: Well it was all conveyed together. I'm not sure I would characterize it as a single parcel. It was all conveyed together.

Mr. Rigual: Well the legal description was the same as that in 1938.

Mr. Lemming: Sure, I can convey a piece of property and give you a legal description of a piece of property that may contain several divisions, but the legal description would simply be the whole, the sum of the parts rather than the individual parts.

Mr. Rigual: I'm sorry, say that again.

Mr. Lemming: The legal description, if I'm conveying a piece of property to you, can simply be the sum of the parts. In other words, I need to get the outer boundaries of the parcel that's being conveyed to you. That's one parcel not for purposes of subdivision. There may be things that have occurred within the contours of that overall description that are not [Mr. Rigual began speaking]

Mr. Rigual: Do you know when he went to the Tax Office and got the tax records.

Mr. Lemming: He probably should tell you that. I assume he did that as part of his effort to develop the parcels. But he'll be happy to answer that question.

Mr. Rigual: Mr. Angstadt, good evening. When did you go to the Tax Records to collect that information?

Mr. Angstadt: I went prior to the meeting with Debbie Ward. She had issued us the in-fill calculations the first time March 19th and at that point she did put a little memo at the bottom that said, the parcel on the corner of Littlepage and Hanover is developable, excuse me, assuming that the parcel on the corner of Littlepage and Hanover is developable and that any new structure will face Hanover Street. So it left an open question.

Mr. Rigual: So March of 08.

Mr. Angstadt: Right. If she had issued that without that little bit of clause at the bottom I would have assumed, just like I have been before you all many times and have built off these in-fill calculations and they do stand up to point of us going to get permits and creating a site plan. There has never been a question of issue me a written order or issue me anything above just sending me the in-fill calculations, plain and simple. I never question them. I assume the City is issuing me information correctly.

Mr. Rigual: If I may ask him directly, either one of you can jump in [to Mr. Lemming]. What made you believe you had two lots instead of one when your 2005 deed described it as one lot or the outside it does not say anything about other conveyances within that description. What made you believe or did you believe, I guess I should ask first, that you had two lots or one when you first bought it.

Mr. Angstadt: I believed I had two lots from the history I knew of the property before I bought it.

Mr. Rigual: What history was that?

Mr. Angstadt: The Pitts, Mrs. Pitts had a home on the front. It was Freeman Grocery or Beverage Company, all that was owned at one time by the Freeman family. From the tax records that we had, the assessor cards that we had, which there were a couple in the way they laid themselves out showed [Mr. Rigual began speaking]

Mr. Rigual: That was in 2008, but I'm going back before that. I was trying to get an idea [cutoff by Mr. Angstadt]

Mr. Angstadt: Well initially when I bought it from the history, from other agents in town. I knew a lot of agents through Long and Foster and there is a lot of older agents in Fredericksburg who knew of both structures existing. That's what I thought first and foremost. Then when I requested the in-fill calculations and this little bit of language was at the bottom that was the first time they have ever come over not being exact not without Debbie knowing for sure. So I went ahead and set a meeting up with her, we went to the Commissioner of Revenue I asked them to pull everything they had for 802/804 Littlepage I asked them to pull everything they had on record for 901 Hanover Street. They turned over two folders worth of things to me. I made copies that day. I looked through them I determined, I sat down with my engineer I wanted him to look at them. Before we could make any moves obviously to do anything else or before we could go any further we wanted a City official to give use guidance. That was a set meeting, this was not I walked-in because I know Debbie's very busy, I'm busy, my surveyor is extremely busy especially this time of year. So this was a pre-arranged, pre-planned meeting, to meet with them that morning, I think we met at 10:00a.m. that morning, and we all met there, we all laid out the documents on the table and we asked for guidance. Tell us what we need to do at this point. The engineer was very specific, the surveyor was very specific, into telling her we're not going to do anything else until you give us guidance on what's here and what we should do. He even told her, I'm clear of where this line is, so I'm going to need your help in this matter. And that's where she gave us guidance that day and, you know, showed us.

Mr. Rigual: Were the deeds part of the information that you gave her.

Mr. Angstadt: We did not bring a deed with us. No, it was just whatever. Really we were trying to determine, at the time, we were sitting down, we were trying to look at the demolition permit because it did give some dimensions of the home. Which was showing us where that lot line really was, because obviously it wasn't cutting through the middle of the house. It gave us that indication, you know that was how we were able to determine. You know all three of us were looking at this together. From there we went down to see the ladies in the Commissioner of Revenue. We wouldn't have gone past that point if this was ever a question. I mean I'm in the

business of selling property to build homes, not spend six or eight months litigating to try to get that far. I wouldn't have gone that far if I didn't have proof that that was case.

Mr. Rigual: I'm sorry to keep harping on this; I want to get as specific as I can, as you can remember. Did you ask her where the lot line was between the two parcels that existed or did you ask her is this one lot or two lots?

Mr. Angstadt: I think basically how we presented it was we were under the impression we thought we had two lots there. We wanted her tell us if she agreed with us. That if this was indeed the case, that if this was a buildable lot, that if we could proceed with building a home. That was really what it was. We asked for guidance and the determination at that meeting with Debbie was, and again I'm not an attorney exactly knowing I'm just going off what they're telling me, but there's a homeowner to the one side and you own this property to get, not a lot line reduction, but to determine your lot line you would have to have the authorization of your neighbor. I assume there is some sort of agreement there where you have a property line dispute and at the time we owned the other parcel. So it wasn't really a whole lot to dispute with, we owned the duplex and we owned the lot. So it was matter of having the City determine now where they felt the lot line was and telling me whether or not they disagreed what we determined we have here and that was two buildable lots. And that determination was never brought to my attention until months later and by that time I sold both parcels. I didn't sell a parcel and then record a plat. The plat was recorded and each parcel was sold off of that plat.

Mr. Rigual: Okay thank you. I think that was all the questions I have. Anybody else.

Mr. Conway: Regarding the buildable lot situation. Would you agree that a tax map does not necessarily constitute, or make, or establish a subdivision? [Directed to Mr. Lemming]

Mr. Lemming: Yes sir, I agree with that the tax maps are not intended for that purpose. They may not reflect subdivisions that have actually occurred.

Mr. Rigual: Any other questions for applicant. If not, we'll move on to the public hearing and I'll just remind the public that when they come up please state your name and address and we're going to ask you to limit your comments to five minutes or less and members of the public may speak only once.

Mr. Ross: How you doin? My name is Richard Ross I live at 815 Hanover directly across the street. I've lived in City off and on since 1954, I grew up on Brompton Street and I'm very aware there was another house there, but still it gets back to one thing. To me this is, Charlie Pitts I knew him I worked with him down at General Products he owned the duplex, I asked him one day why don't you put a garage on this lot. He said they won't let me. I said they won't let you, what do you mean. So we never thought it was buildable lot, its 30' wide x 66' long. And when it came up for sale I said you got to be kidding me they gone sell this lot it can't be worth over $30,000 you can't build on it. And then all of a sudden this comes up and we go this is crazy. But anyway I think we're not going to beat a dead horse here. It gets down to assessor cards don't have anything to do with plats. To divide a property you have to do a plat. They did not just start doing surveying, surveying has been going on for many many years. If you have to subdivide a lot you need to do it legally, that wasn't done here. That's the way we feel. This lot

is too small. I feel sorry for the gentleman who bought the lot, but we just don't think it should take place. Thank you.

Mr. Stageberg: Thank you for giving me the chance to talk. My name is Steve Stageberg, I live at 1414 22nd Street NW, Washington DC. I came to Fredericksburg in 1982, I joined the faculty at the University of Mary Washington, I rented a house on Payne Street, I bought my first home at Spottswood Street, I moved up to a townhouse on College Avenue, and then I finally built a home in Huntington Hills Lane. So I've lived in Fredericksburg for about 28 years in the City. I moved to Washington about three years ago, I thought I would like to see how the other half live. Well, I think I'd like to move back to Fredericksburg. I contacted Weichert Realtors, and said is there anything in the City. I've always lived in the City I don't want to live out in the suburbs. They checked the listings and found a number of buildable lots by Properties by US in the City that they would build custom homes on. So we toured around and I saw this postage stamp lot at 901 Hanover Street, I said you know what just like when I saw my first home that I first bought in my life on Spottswood Street it was kind of crazy when I walked by it but I said that's me. So we designed a beautiful home and we closed on this in the end of August and the City sent me duly, I'm sorry I mean, duly sent me a real estate property tax bill for that lot and I paid that bill and then about two or three months ago I heard through the developer that the City is claiming my lot doesn't exist. So I've plunked down about a $140,000 now and I have nothing. This has become a nightmare in the last two or three months. I just look to you to quickly resolve this mess and hopefully end my nightmare. Thank you.

Ms. Garfield: Thank you. My name is Kathy Garfield I own the property next to the one that's under discussion today at 806 Littlepage. From hearing everyone talk today my conclusion is a lot of actions were taken on false assumptions and a lot of people have been injured through those false assumptions. I do think that some compensation should be made, but I also don't think that it should be to take a lot that doesn't exist and make it exist. The duplex that is built on that lot that you could spit and make it be on the inside of their window. So when that structure was once put on the lot it obviously wasn't spaced in such a manner that you would think it was one lot, however, it is they just happen to have a nice side yard that looks like you might be able to squeeze a house on but not well. I would think that it would not be in the interest of Fredericksburg to put a house on that property for several reasons: one, aesthetically, but more importantly, for safety. There are a lot of cars already parked on those streets, this would generate more cars on the street more than likely but it would also generate more pedestrian traffic. Right now we have a lot of college students, a lot of local people who walk in that area, they walk their dogs we do not need to have a whole lot more congestion in area that is already congested. Thank you.

Mr. Rigual: Thank you.

Ms. Harris: Hello, I'm Linda Harris, I am that Weichert agent. I just wanted to clarify that Steve and I have done business (Mr. Stageberg) before and we didn't just ride around looking at lots. We went into the MRIS system and this was listed, I mean in good faith I sold him a listing for a house to be built and that's pretty common in the system. Thank you.

Ms. L. Angstadt: My name is Linda Angstadt my husband is Keith Angstadt and my son is Keith Angstadt, they are owners of Properties by US. I would like to just make a quick statement. Mr. Ross gets up here and says about a garage and he couldn't believe they wouldn't

let him build a garage, back then when the house was there that was his wife's grandmother's house. He knows very well that there was a house on that lot; he knows the size of the house on that lot. He's not unaware there was a building there; his wife has pictures of the house that was there. I have talked to her before, before all of this became a big issue and she remembers when the house was torn down. If that helps anybody with their decision.

Mr. O'Malley: Good evening, I'm Michael O'Malley and I live at 907 Hanover. I'll make it quick I've talked four or five times at these meetings it seems like. It seems to me this things has dragged on for a long time and it's now gotten lost in a lot of legalize, but it seems to me the simple fact is at the original meeting when we came the applicant asked for a variance on the setbacks and at that meeting if my memory is correct, the applicant did not get what he was looking for in the way of setbacks. I think a lot of that has to do with that this Board realized that was a crowded lot that would crowd the lot so they did not get that. There was an appeal I think, and maybe I'm using the wrong term, but there was an appeal to maybe make the setback not quite a—they differ from the original. But I think the fact of the manner is that it seems to me pretty simple, the lot is not buildable without getting the variance. I think the reason the variance is there or the setbacks are required at what they are is because it would make that area or you would have to have it otherwise it goes against the grain of that particular area. It seems to me it all really comes down to the setbacks and the lot really does not look like it appropriate to have a building on it. And I think that why that is important is that because crowding that corner could create a safety issue, which is my only concern in this matter. Thank you.

Mr. Rigual: Thank you.

Ms. A. Angstadt: Hello, I'm Alicia Angstadt, I'm an agent with Long and Foster, my address is 1500 College Avenue. I listed the property for sale, which I would never have done if I would have know it were not a lot that could sold based on what it was being sold for. I do carry a license in the Commonwealth of Virginia and would never have done that. I base all my listings on the facts that are given to me. As far as the crowding of that area, there is a light there. If you drive through the City of Fredericksburg there are numerous homes on top of one another. Not everyone has the luxury of having numerous lots that are combined where there home can be situated on it and they have a nice piece of land there. This has become a nightmare for everyone in this, that are involved in all this. I'm sure for the neighbors as well it's become a nightmare as well. If you drive through the City of Fredericksburg you look at every corner lot there are homes upon homes, this is a City this is not subdivision out in the Spotsylvania out in Stafford where you're going to have large tracts of land. We're in the City, there's going to be a lot of foot traffic, there's going to be a lot vehicle, we are a college, or university town now, excuse me, I just feel that this is going to be a nice home for nice gentleman who wants to live in the City this has become very much a nightmare for him a nightmare for us and all he wanted to do was move back to the City of Fredericksburg and live where he obviously works and to a home that he would love and he's designed it. That is pretty much all I have to say.

Ms. O'Malley: Good evening, my name is Carrie O'Malley and I live at 907 Hanover Street. And my property is comprised of four parcels and I dare say it's not a luxury, I've paid dearly for it. I work very hard to pay for the mortgage every month and I pay pretty extreme real estate taxes as well. I think Kathleen Dooley did a pretty good job of outlining the issues here with respect to how this all came about, but I think there's some important things to bring up about the situation and generally about this type of development. I also happen to be a commercial real

estate attorney and I have been one for the twelve plus years and so I do advise clients on a daily basis about how to develop property and what they should do to protect their interest and how to go about making sure their interest are not compromised and they are represented well and they ultimately at the end of the day get what they want. In every real estate transaction I typically advise them to do a title search and obtain a title policy. To buy a survey and to order a zoning letter, there just basic. If it's a property that may warrant an environmental I'll ask them to do that as well. A couple of things I think are very important to note, I'm not a surveyor I'm an attorney but in my practice ordering surveys over the past twelve years and dealing with surveyors and engineers, surveyors don't base their determinations on meetings with City Officials. Nor do they base their determinations on, let me go meet with the Assessor's Office and take a look at a couple of index cards that we have no idea who drafted them, when they were done, there are no metes and bounds. Surveyors are very detailed, they are engineers. They focus on what's been recorded in the land records that establishes monuments, and metes and bounds descriptions and then they also rely on a physical inspection of the property. So the other issues with respect to the Assessor's Office and a conversation with Ms. Ward where they're asking a City official with no engineering or surveying certificate is irrelevant and just not done. The other thing I'd like to point out is there were six conveyances between December 1938 to present, essentially, to 2005 when actually to April of 2008 and all six of those conveyances describe the property by the metes and bounds, one parcel, it's a metes and bounds description. If you've got a piece of property that is several different lots you'll either refer to it by subdivision plat or you'll refer to it by parcel lot 1 and you'll have the metes and bounds for lot 1. Lot 2 you'll have the metes and bounds for lot 2. I think the question was raised earlier, when did this get subdivided, that's the issue here but bottom line is it hasn't been legally subdivided, at all. The last subdivision of this property subdivided from this women's property from what's existing as now 901 Hanover and 802/804 Littlepage. That's the issue, it has not been legally subdivided. You even look at the survey that the Angstadts ordered and it was delivered by Long it still lists the 114.85 feet as the total distance from Hanover Street to the property line on the other end. Why is that relevant here? Well, it's relevant because it's always been known as 114.85 it's never been split up it's never been divided and no one can answer the question of how they got this line here. It's not a legal subdivision for that line. The second thing, while I appreciate Mr. Lemming's statements that they relied on certain things, if you look at the meeting in March with Ms. Ward that was end of March 28th, the survey was dated April 2nd, that is one business day apart. I mean so how much could you have relied on Ms. Ward when your survey has been done that close. Then it was recorded on the 15th so very little time was between then and when the survey was finally gotten. I also want to say that while Mr. Lemming says things were done a little informally back in the day, I appreciate that, but surveying still there are certain things you do when you have a survey. And you go to the Land Records to see what's there not the Tax Assessor's Office and you do a physical inspection of the property and nothing shows the line that's here on the property or in the land records and I think that is very important to understand. I also think and several of my colleagues who do a lot more zoning work than I do know that when you want a determination from the Zoning Administrator on an ongoing development you have several meetings with Ray Ocel. As a matter of fact if any of my colleagues were here and said well he said we could do this and that was a done deal from one of several meetings that's not how it works. You want a legal determination you pay the 50 bucks or 100 bucks whatever it is I think it may even be free in the City and you write a zoning letter and you request that you would like to know these 20 things about the property. And even to help Ray because he gets a lot of these you submit a form letter, which I've done before, and to Ray, the counties and many other counties in Virginia and say

here's my form letter can you please fill-in the missing information. Nowhere did the applicant ever do that ever. There were verbal conversations back and forth and as we know with real estate verbal is not going to do it. If you want a written determination you have got to be able to rely on something you have got to have it in writing you want to be able to understand. I sat up here two years ago and said the same thing, the guys at the Sunken Well Tavern had several discussions with Ray, everybody has several discussions with Ray, he deals with hundreds of people a week on a multitude of different projects. So I think it is very important to take all of that into consideration. Lastly based on what I said I really do implore you to confirm what Ray Ocel has said, this is one lot it's never been subdivided there's no evidence anywhere of a subdivision. And I would ask that you rule that is only one lot. Thank you.

Mr. Tatum: Ben Tatum I was hired by Kristopher Angstadt to do the survey. This is a mess. When I run into problems determining where property line are where there are one or two lots I rely on the City Officials, County Administrator, or whatever the case might be to get my information. I just want to make it clear that there would've been no one that a plat would've been recorded without guidance from the City staff. With the information that was found by me and Mr. Angstadt with two lots existing we took that information to Zoning Department and we got clarification that two lots did exist. So I just want to make it clear to you guys that I would've never put my company on the line to produce a plat that was illegal. I do believe that two lots do exist, not all records are going to be found in the Circuit Court. I deal with this quite a bit, especially on old properties dealing with the City the age of the City, the age of the deeds and stuff we are talking about. Definitely not all evidence is found in the Circuit Court. I thank you for your time.

Mr. Rigual: Would anyone else like to comment. Mr. Lemming would you like to The public hearing is now closed. Rebuttal Mr. Lemming.

Mr. Lemming: Let me respond to a couple of the point that were raised by some of the speakers. With regard to whether this is a buildable lot from the standpoint of the laymen or not clearly until 1968 there was house on it. Somebody figured out they could put a house on it and had a house there for a substantial period of time. As far as what it's worth the City's Tax Assessor still says it worth that piece of property not the combined property but the portion we are talking about is worth $100,000. Mr. Stageberg has the most difficult plight here I believe. Mr. Stageberg does have a title policy – hasn't done him any good so far. Mr. Stageberg did have a survey, the one that came with his deed - that hasn't helped him so far. He bought the lot in good faith and I think it's pretty clear that everybody associated with this believed there were two lots there. Why did they believe this? Clearly Mr. Angstadt started with that impression but then had doubts about it and that's what led to the meeting with Ms. Ward. Doubts about where the boundary line was located, this is not as simple as a surveyor doing his work and going to the Land Record's. They had a specific issue, as Mr. Tatum has indicated, that they sought assistance from the county about, that he sought assistance from the county. That's why he was at the meeting. There would have been no reason for Mr. Tatum to come to the meeting with Ms. Ward in the event that he knew where to put that boundary line or it was clear where that should be established. The parties all relied on this there is no question about this, no question that everybody that was involved in the meeting all the outside parties left the meeting and believed they had something that they could rely on. That's clear based on what they did after that point in time. So there you have the situation today. The City believed that there were two lots, everybody else involved believed that there two lots. Now maybe there was a point in time

where you could back all of this up and start again and nobody would be hurt, but we are not at that point now. We are way past that point. I don't envy the position you're in. A lot of people have a stake in this, I ask you to consider who the major stake holders are. What we've tried to do is give you a procedure, a mechanism by which you, I think, can quite logically reach a decision that what happened back in March that these parties, Mr. Stageberg, Properties by US, the Angstadts were entitled to rely upon. Ms. O'Malley mentioned the deed being created so quickly the only up in the air after March the 28th or on March the 28th was where to put the boundary line. That's simple enough to do. It was not recorded until the 15th....

[tape changed]

Mr. Lemming: ...the one you've heard today. We had also have attempted to come to you with a series of variance applications. Variance applications that would be necessary in order for the subdivision to occur formally, it would still have to go to the Planning Commission, but the variances would be necessary to make that happen. The City, Mr. Ocel, has taken the position that the owner of the duplex must consent to those variance applications, he would not. So we were not able to bring those variance applications, all of which pertain to this lot, because the City views it all as one lot and believes the other property owner would have to sign off on those variance applications and he refused to do so. So what we have put before you is the argument that we think is the strongest one. It's obviously not one that's going to make everybody happy, but we think that there is substantial evidence that there was a determination that was made on March 28th. It makes no sense at all in trying to decide what factually happened at that point in time. It make no sense at that if the boundary line was not an issue, if the subject of the lots was not an issue on March 28th that they would even go visit the Commissioner of the Revenue. Why would that—that's uncontested—why would that be necessary in order to determine in-fill calculations. The very notion of in-fill calculations presumes there is a buildable lot you would provide those in-fill calculations for. The City was in the last and best position to have raised a flag here, they didn't, they gave them a green light no red flag, and that's why we are where we are now. None of this would have happened if somebody had raised a red flag back in the spring. Nobody did. So damage, serious damage, has occurred since that time and at this juncture because of the adjacent owner's unwillingness to even sign consent forms to get this straightened out this is the only way to get it fixed in a manner that's consistent with what was thought by everybody, everybody—Mr. Ocel, Ms. Ward, Mr. Stageberg, the Angstadts—everybody. I've looked at your minutes for the first hearing and even at that hearing there was no issue as to the legality of the lot. That was assumed by everybody including all of the public speakers that were here, that there was a buildable lot there. This simply comes to belatedly be equitable and we've tried to give you a way to straighten it out and we hope that you'll do that. And I appreciate all your time and effort into it and I know this is a pretty weighty matter for you to deal with. Thank you.

Mr. Rigual: Thank you. Now the Board will have some discussion and perhaps there'll be a motion. Would anyone like to start? I don't mind starting. This is difficult. The two issues overall after looking at all this I don't think there's any question in my mind that it's a single lot. You go back to 1938 and you look at the land records, the chain of title, it's always been described as a single legal description, a single lot since that date. From owner to owner even to Mr. Angstadt, and Mr. Angstadt to Properties by US, LLC it was always described that way. The only evidence that I've seen, and it's evidence it's proper to consider it, that it was subdivided is on this card in the Real Estate Assessor's Office. But we also know that over the

years the way it was billed and the way it was assessed changed, it went back and forth. For me personally, I think the real issue comes down, and that's why I asked so many questions about it, the real issue comes down to what happened on the 28th of March and was a determination made at that point, and then did things start happening after that based on that. I think to begin with when I was looking at it, in my mind I think everyone on the 18th even Mr. Angstadt I asked him questions about 2005 but everyone was under the understanding that there were two lots here, I don't think there's any question about that. When it started the only issue was give me the in-fill calculations for this lot and that was done. I think at that point, everyone agrees at that point there was no issue if there was one lot or two lots. Then it became a concern after that for Mr. Angstadt, now we're talking about the meeting on the 28th when he comes with his surveyor and visits the Land Records Office and he gets information from the Real estate Office and he brings all those things including his surveyor and he meets with Ms. Ward. There's a difference now, this is where it comes down to a difference in what happened during that meeting and what was said, what Ms. Ward was asked to determine. It's difficult, I've dealt with a lot of cases and when you go back that far you're never going to get the same relocation of what happened and what was discussed. I think to some extent it had to be discussed, at least at the very least, I think they were still operating under the assumption that there were two lots and the issue became (at least one of the issues) one being the in-fill, I remember Mr. Angstadt was very upset that he even had to come for a variance. Again, when it started he had a lot that he could build of right the only issue was in-fill calculations, he based his design on the in-fill calculations those changed after Ms. Ward admitted she made an error on those. I think that was primarily the purpose of the meeting to get that straight and determine whether or not he needed to file a variance application or not. That was really the focus of it. I also see the evidence that why bring your surveyor, why go to land records unless you are going to at least discuss the line between the two, I think it probably was discussed although it wasn't the focus of the meeting. So after that meeting everyone is still operating under the assumption they moved forward with these. For me personally it comes down to whether or not whether at that meeting there was a determination made. It is a difficult question. Does anyone else have anything to discuss on how they see it.

Mr. Gratz: I'll contribute a little bit here. I agree with Mr. Rigual it seems to me that its one lot based on everything that I can see that it was one lot. But it does go back to what was discussed back in March and what kind of decisions were made. But I don't understand right now whose responsibility it was to catch this early on. The developer came in he had some information, he made a presentation we have to assume he made that all in good faith and he wasn't trying to put one over on somebody. He felt that based on the information he had he believed that. Then he presented this to Ms. Ward and unfortunately there was not a formal written request it was more informal type thing. She responded somewhat informally as well in an email and ultimately had to make some changes in that. Mr. Ocel was involved in the sense that apparently he was asked about it, but he didn't write anything back in March. He apparently gave her some information she passed it on and then things started to take off. They were doing it on the basis of the information they had, the developer had, and they recorded a new plat and they sold the plats and the rest is history from there. So whose responsibility was this early on? If I understand this correctly noboby raised any questions among the City personnel, the developer didn't raise any questions beyond trying to address just that one issue Ms. Ward raised, is the lot developable. It wasn't raised until the neighbors raised questions and they did some searching. It is a hard decision on what to do. If it were just voting on is this a divided lot or is it not a divided lot I would say it's not divided. The question of whether or not a decision was made in March and

therefore the time for the City to object has passed or had passed by the time Mr. Ocel made his decision. That's a harder decision and I am not sure and I am sort of inclined to say the City made a decision in March and has to live with it.

Mr. Rigual: I'm a little bit concerned that Ms. Ward didn't have all of the information that would've been helpful to make the determination if that was being discussed. I mean the deeds, that's the elephant in the room. Why wasn't she presented, if it was the main issue and said I have to figure out if I have two lots or not, why not say Ms. Ward I have this deed that says I have one lot and I have this other evidence over here that says it could be two, it says subdivided in '42 or lots divided. I think she would've had more information to make a better decision or a different decision or at least put the brakes on and raise a red flag at that point. The City I think does have some responsibility, I think the issue was discussed it had to be otherwise there was no need to do all of that. The issue was there although it probably was not the main issue, so I'm inclined to believe that there was a decision made at that point at least one that can be attributed to the City under these strange circumstances.

Ms. Ross: You see that's where I don't agree. I can get behind the idea that yes we're still dealing with a single lot that has not been legally subdivided. But, I can't support the idea that the March 28th meeting had any legal bearing based on a verbal conversation. A lot of assumptions were made there's no argument with that. I think information that was provided Ms. Ward at that March 28th meeting was what was given to her, there was no in-depth analysis asked of her at that particular meeting. It was look at these cards kind of help us, we're seeking your guidance is what I heard in the public comments portion. There just wasn't any legal substance or legally binding agreements being made between the City and the property owners or the developers it was all just based on conversations. I'm thinking that I'm going to be in support of upholding the Zoning Administrator's decision. Thank you.

Mr. Conway: I would just like to say that I think there were a lot of assumptions made on both parts and possibly for some valid reasons over the years. But I think I would've gone to maybe, looking at the deed or certainly determining up front that it was one lot rather than assuming it was one lot, regardless of the facts. I think that it's unfortunate and I think certain people have been aggrieved, but it would be my opinion that it has been one lot and it remains one lot.

Mr. Rigual: Any other comments or discussion. Are there any motions?

Mr. Gratz: Will we make the motion that's given for us here. I am not sure where it is.

Mr. Rigual: Where is that?

Mr. Gratz: Here it is. Does someone want to make that motion?

Mr. Rigual: Actually I was planning to make the opposite.

Mr. Gratz: I know.

Mr. Rigual: This is the resolution, this would be after if we approve it. I just want to make sure we just address the issues correctly in the motion. Correct me if I'm wrong Ray, but I'm just looking at your letter of November 12th, I want to make sure we frame the issue correctly

because I think we have two parts to this. The Zoning Administrator on the summary anyway decided it was a single lot, but there is a defense to that I guess you would say is that the determination was made in March and therefore it can't be overruled. I think we make a finding on both of those issues. No actually don't.

I'm going to move that we overrule the Zoning Administrator's decision of November 12, 2008 on the basis that a decision or determination, a written decision or determination was made on March 28, 2008 that there were two lots on the property and that more than 60 days passed between that date and the November Zoning Administrator's decision.

Mr. Gratz: I will second that.

Recording Secretary asked Mr. Rigual to repeat his motion.

Mr. Rigual: The Zoning Administrator determined that there was a single lot on this property and I'm moving to overrule the Zoning Administrator's November 12, 2008 determination that this is a single lot, but because the reason for that is that I think there is sufficient evidence to support the conclusion that Ms. Ward, an official of the City of Fredericksburg, made a determination that there were two lots on the property on March 28, 2008 and therefore the Zoning Administrator's determination on November 12 is outside of the 60 day limit imposed upon the City by Virginia Code 15.2-2311(c) and therefore should be overturned.

Mr. Gratz: And I seconded.

Recording Secretary called for the vote: Mr. Gratz – Yes, Mr. Conway – Yes, Ms. Ross – No, Mr. Rigual – Yes. Motion carried 3-1.

Other Business

2. **V08-09:** Variance from Zoning Ordinance section 78-245, 901 Hanover Street, zoned R-4, Residential, to reduce the front yard requirement from 30 feet to 15 feet, to reduce the left side yard setback from 10 feet to 3.6 feet, to reduce the yard setback on Littlepage Street from 30 feet to 9.1 feet, and to reduce the rear yard setback from 25 feet to 16 feet for construction of a detached single-family dwelling.

Mr. Rigual asked staff to present their report.

[verbatim]

Mr. Ocel: Nothing new to add than we had previously done. You basically have the similar application that you did here a few months ago with the variance request for the front, side, and rear yard setbacks.

Mr. Rigual: Is there anything from the applicant on the variance.

Mr. Lemming: I'll be very brief on this. This is the variance that was on your docket for your October meeting. I think it's fairly straight forward. These are the setbacks that are necessary now that the BZA has determined this is a lot these are the setbacks that are necessary in order to

construct the home that Mr. Stageberg has planned. What he did do, what has happened since your September meeting when you denied the variance is that there was an increase, the house was slid back so that there is a larger front yard that is available for the house and less of an obtrusion from the standpoint of the traffic and the street it was all moved backward. But this is exactly the same variance application that was before you in October when you all tabled it then.

Mr. Rigual: Would any members of the public like to comment on the variance request. Same rules apply, please limit your comments to five minutes, name and address, and each person may speak once.

Ms. O'Malley: Carrie O'Malley, I live at 907 Hanover Street, in the City right next to the lot in question, the vacant lot. It is well established law by the Cochran case that to have a variance you have to have a hardship and all four of you just said that there is only one legal lot and you have now granted two by a technicality. The one legal lot that now by the technicality has been granted two was created by the April 2, 2008 survey which was recorded on April 15, 2008 that document was created by an agent of the applicant and that was created by him in order to establish two separate lots in order so he could sell them to two individuals, one that happened in June and one that happened in August. And by the Cochran case you cannot create your own hardship. The things that you have to remember are now that we have hurdled at least temporarily the fact that there are two lots the applicant has to prove there was hardship. And in fact the case law holds that you cannot create your own hardship, and that is what has happened. He created these two lots. There were never these two lots in any of the conveyances from 1938 to 2008. It is well established, each one of you just said it for the record, that there was one lot. That being said he created his own hardship and that does not meet the legal requirement in order to get a variance. He does not even hit the other hurdles he has to have to prove in fact that he has met the requirements of the variance. Other things that you should consider in the variance which you have already considered and denied albeit now we've slid it back a couple of feet, don't think that makes a lot of difference because we still have the same issues that we had in September when we voted three to one against the variance. And those issues are congestion in the area, safety issues, the fact that this variance is going to be substantially detrimental to other property owners and adjacent owners, and it is going to negatively affect the character in this area. I agree it's the City and houses are closer than you would have in sprawling counties but they certainly don't need to be pigeonholed in on postage stamp lots, which is exactly what's proposed here. You have to consider first of all, my argument here is that it's one lot okay they got a technicality, now they have to meet the hardship. They haven't because they created their own hardship with the April 2008 plat. But even if you guys hurdle that, which I'm hoping you won't, you got to take into account what it will do to the neighborhood. This piece of property has been my family for over 75 years. I have four lots, I pay dearly real estate taxes on them and I also pay a nice mortgage to have a house like this. I have a nice view, I have different things that have been in place for years, I grew up here since I was seven, which I know you've heard me say before. We've never had building on that vacant lot, we've always had a clear view over to the Ross house and over in that area and that will now be completely detracted and interfered with and that's just one of the things. I have two children, you know, six years and under, who when I grew up road bikes around the block, now we have got safety issues. We already have traffic accidents on this corner. Both of the traffic lights have the do not turn on red lights that shows how much congestion and low the visibility is on that corner. You add a house there and not only are you going to detract but the City is going to have issues with safety and all kinds of

other issues with respect to the congestion, parking and the like. I again ask you to do what you did in September and deny this variance.

Mr. Ross: Richard Ross again. I would just like to say, why does the City have to approve a variance. We don't have to fill-up every green space in Fredericksburg. Just because you feel sorry for somebody or somebody made a mistake don't make us pay for it. Thank you.

Mr. Rigual: If there are no other members of the public we will close the public hearing. Is there any rebuttal by the applicant?

Mr. Lemming: Let me address the issue of hardship. The BZA by its vote a few moments ago established the lot that puts us back to the situation in October and the staff report that was before you Mr. Ocel stated the hardship. The hardship is not everything we have been talking up till this point. The hardship is now we have this lot what can be done with it. As Mr. Ocel stated the hardship for your October meeting the property addressed as 901 Hanover Street is not a sufficient size after applying the minimum yard setback requirements for the R-4 district to construct a single family detached structure. That's what this lot is for a single-family detached structure. The lot is now created. Infill calculations are not helpful in this situation nor does the Zoning Ordinance have provisions regarding the application of in-fill calculations for rear yards. Now what has changed since the September application and there is a litany of the specific reductions that are requested here. In September, the reduction of the front yard setback that was requested was nine feet that is now 15 feet that's on Hanover Street that setback, the reduction of the front yard setback on Littlepage Street was 9 and that has increased by a very small amount because of the shift of the house that is 9.1 now, the rear setback in September was 22 feet that is now 25 feet, and the left yard setback was the request in September was 2.5 the reduction now is 3.6 feet. So that is what has changed I was not present at the September meeting my understanding was that this was based on some guidance that was given from BZA members at that time. So these were the new calculations that were developed in order to adjust the house in way that was deemed to be more acceptable from the standpoint of the BZA members and the specific questions that you all had raised and the vote that occurred in September. So the important thing about the hardship is that legally the hardship is not everything in the world that has happened now. The hardship is that we now have a lot, a single-family lot, that is of unusual shape and on which a conventional home with conventional setbacks can simply not be constructed. So that is the request.

I'm sorry let me make a correction, the rear is reduced to 16 feet that is the request that is on the rear setback that is before you now. It is my understanding that this permits Mr. Stageberg to proceed with the home that he has planned on the property, which he could not otherwise build.

Mr. Rigual: Thank you. Any other discussion by the Board?

Mr. Gratz: I would just comment that I think the main problem with the house on the lot, rather it's the newly established lot size or whether it's the original size is going to be the width. Not so much the length. There is a problem with the length now as well but the biggest problem is the width, the lot was only 30 feet wide to start with. With that width you couldn't build anything on there even if we had not just overturned the Zoning Administrator's decision so there was a problem to begin with.

Mr. Rigual: I think the strict application of the Zoning Ordinance would eviscerate the lot completely. Any other discussion or motion?

Mr. Gratz: I move that we approve the variance request with the recommendation from the Zoning Officer about that construction must begin within one year of issuance of variances and the variances as written in the motion and that the dwelling will not exceed 27 feet in height. There was that second recommendation as well.

Mr. Rigual: I will second that.

Recording Secretary recorded the vote: Mr. Gratz – yes, Mr. Conway – no, Ms. Ross – no, Mr. Rigual – yes. The motion is denied by a tie vote of 2-2.

Mr. Rigual: It has been denied. The request for your variance has been denied it was 2 to 2 you need three to carry any person aggrieved by that decision can appeal to the Circuit Court within 30 days.

Mr. Lemming: Thank you for hearing us.

[End of verbatim]

APPROVAL OF MINUTES

Mr. Rigual asked if there were any changes to the minutes for October 20, 2008, November 17, 2008, and December 17, 2008.

Mr. Gratz said he was not at the meeting for November 17, 2008.

Mr. Rigual made a motion to approve the minutes for October 20, 2008 and December 17, 2008 meetings. Ms. Ross seconded. The motion carried unanimously.

Mr. Rigual made a motion to approve the minutes for November 17, 2008 meetings. Ms. Ross seconded. The motion carried unanimously with Mr. Gratz abstaining.

Election of Officers

Mr. Conway made a motion to postpone the election of new officers until the next scheduled meeting. Mr. Gratz seconded. The motion carried unanimously.

Staff/Board Comments

None

The meeting adjourned at 6:59 p.m.

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Richard Conway, Vice Chair